

WILLIAM ASHLOCK
Claimant

J. E. MERRIT CONSTRUCTORS, INC.
Respondent

CIGNA

Docket No. 233,332

The respondent has raised a jurisdictional issue that subjects a preliminary hearing order to Appeals Board review. See K.S.A. 1997 Supp. 44-534a.

On March 11, 1998, claimant was employed by the respondent as a pipefitter and crane operator. Claimant alleges, on that date, he injured his low back while driving a small crane across some railroad tracks. Claimant testified he was sitting in an awkward position in the small compartment cab of the crane when he felt a sharp pain in his low back. Claimant is a large man, six foot two inches and weighs approximately 400 pounds. The small crane claimant was driving had no suspension system and bounced roughly as it crossed the railroad tracks.

Claimant did not report the incident to the employer because the pain had almost subsided before the end of his shift. However, after claimant drove some 50 miles home from work, he was in so much pain he had to be helped into the house.

Claimant was unable to return to work the rest of the week, on either Thursday, March 12, or Friday, March 13, 1998. Claimant's wife testified she telephoned the respondent on March 12, and told the respondent's timekeeper that claimant would not be at work. Claimant's wife testified she again called on Friday, March 13, and notified the respondent's timekeeper that claimant would not be at work. But this time, she indicated claimant would not be at work because the water pipes had broken in the house the night before. The first time claimant notified respondent he had hurt his back at work was on Tuesday, March 17, 1998, after he was hospitalized.

Claimant had, in the past, received chiropractic treatments for low-back problems. In fact, on Friday, March 13, 1998, claimant received a treatment from chiropractor Charles E. Shue, Jr. However, claimant testified the treatment did not give him any relief. Finally, claimant's low-back condition worsened to the point that on Sunday, March 15, 1998, an ambulance was called and claimant was taken to the Greenwood County Hospital.

Claimant was first seen by Janet E. Bradshaw, D.O. She took a history from claimant that did not contain a description of claimant hurting his low back at work. By that time, claimant's bowels were also blocked and Dr. Bradshaw treated claimant mainly for constipation problems instead of the back problem. However, the hospital emergency record does indicate under the box requesting yes or no for an on-the-job accident, two question marks plus the notation of Wednesday, March 11, 1998.

Dr. Bradshaw could not continue to treat claimant and claimant's care was transferred to M.D. McClintick, D.O. Because claimant did not improve with conservative treatment, Dr. McClintick transferred claimant on March 19, 1998, to Wesley Medical Center in Wichita, Kansas. Claimant was examined and evaluated by orthopedic surgeon Bruce R. Buhr, M.D. Dr. Buhr had claimant immediately undergo a CT myelogram, and he found claimant to have a complete blockage of his spinal cord at L3-4. Dr. Buhr performed emergency surgery on claimant at the L3-4 and L4-5 vertebrae levels. The doctor found a huge herniated disc fragment completely blocking the spinal cord at the L4-5 level. Claimant's post operative recovery was satisfactory, and he was transferred

to the Wesley Rehabilitation Hospital on March 27, 1998, for physical rehabilitation. Claimant was discharged from the rehabilitation hospital on April 23, 1998.

On the date of the preliminary hearing, July 21, 1998, claimant could ambulate only with the assistance of a walker. Dr. Buhr, in a letter to claimant's attorney dated May 4, 1998, believed claimant needed braces for ambulation, and it was his opinion that claimant may need the use of the braces the rest of his life. The injury and the subsequent surgery had also damaged claimant's bowel and bladder function. Dr. Buhr also opined that claimant was temporarily disabled from any occupation for at least six months.

The Administrative Law Judge had the opportunity to observe the claimant, claimant's wife, respondent's timekeeper Frances Rice, and respondent's safety manager Bryan Ladson testify in person at the preliminary hearing. Respondent argues that claimant's testimony is not credible because there are so many inconsistencies between his testimony, the history he related to the hospitals, and the testimony of respondent's representatives. Respondent contends the more plausible explanation for claimant's severe low-back injury and the need for surgical intervention was the result of an ongoing preexisting low-back condition that was permanently aggravated while claimant was in the process of fixing broken water pipes at home on Friday, March 13, 1998.

The Appeals Board acknowledges that there is some inconsistencies and discrepancies between claimant's testimony and the testimony of respondent's representatives. However, as more fully explained below, the Appeals Board finds that most of these inconsistencies and discrepancies are explained in the record.

Both claimant and his wife testified that claimant was asymptomatic before he went to work on March 11, 1998. After claimant returned home from work, he was in so much pain he had to be helped in the house from his pickup truck. Claimant and his wife further testified that claimant only instructed his son and his son's friend on how to repair the water pipes and claimant did not do any physical work.

Furthermore, claimant testified he did not describe to Dr. Bradshaw how he hurt his back at work because she did not ask him, as she was primarily interested in treating his constipation problem and not his back. The claimant gave both Dr. McClintick and Dr. Buhr consistent histories as he told them that he had his first onset of pain in his low back while driving the crane at work. Claimant's safety manager testified claimant told him he did not have any money or health insurance and that was why the injury should be run through workers compensation. Claimant, however, in his testimony, denied he made such a statement. Respondent also did not present any evidence in the record that claimant physically participated in fixing the broken water pipes causing a permanent aggravation to his preexisting low-back condition.

The answer to the question of whether claimant's severe low-back injury is related to his employment with the respondent hinges on the credibility of the witnesses who

testified in person before the Administrative Law Judge. The Administrative Law Judge had the opportunity to personally assess the demeanor of the witnesses and to judge their credibility. The Administrative Law Judge's preliminary hearing Order also acknowledges that there is some inconsistencies and discrepancies in reference to the testimony of the claimant. However, the Administrative Law Judge had to find claimant's testimony truthful when he found that claimant's severe back injury arose out of and in the course of claimant's employment with the respondent. The Appeals Board finds some deference should be given to the Administrative Law Judge's conclusion because he was able to see the witnesses testify in person. The Appeals Board finds, giving some deference to the Administrative Law Judge, that claimant proved he suffered a low-back injury while working for the respondent on March 11, 1998.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Jon L. Frobish's preliminary hearing Order dated July 22, 1998, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 1998.

BOARD MEMBER

c: James E. Martin, Overland Park, KS
Vincent A. Burnett, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director